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Supreme Court, U.S.
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No. 03-1593

IN THE

Supreme Court of the United States

ROBERT R. MONACO,

Petitioner,

v.

AMERICAN GENERAL ASSURANCE COMPANY, AMERICAN GENERAL CORPORATION, WILLIAM LEARY, JOHN DOE, AND RICHARD ROE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Third Circuit correctly hold that the New Jersey State Supreme Court's decision in *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999) requires a party who raises a claim of age discrimination under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. § 10:5-12a to demonstrate that he was replaced by someone sufficiently younger as part of his prima facie case?

2. Did the Third Circuit correctly hold that Petitioner Robert Monaco failed to establish a prima facie case where Petitioner's replacement was three years older than Petitioner and the employees against whom Petitioner sought to compare himself were not "similarly situated?"

RULE 29.6 STATEMENT

Respondents American General Assurance Company ("American General") and American General Corporation ("AGC") are wholly owned by American International Group, Inc. ("AIG") which is a publicly held company.

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RULE

SUP. CT. R. 10 13

OPINIONS BELOW

The Respondents American General, AGC, and William Leary respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion in *Monaco v. American General Assurance Co. et al.*, 359 F.3d 296 (3d Cir. 2004).

STATEMENT OF JURISDICTION

The Third Circuit entered judgment on February 23, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents an issue solely of state law under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. § 10:5-12a.

STATEMENT OF FACTS

American General sells insurance products to employers and associations, as well as credit, life and disability products to financial institutions. The Petitioner Robert Monaco ("Petitioner" or "Mr. Monaco") was hired in 1975 by United States Life, American General's predecessor. In 1988, the Company promoted Mr. Monaco to Vice President of Sales for the Eastern Region, a position Mr. Monaco held for eleven years. As a Vice President, Mr. Monaco had far-reaching responsibilities, including coordinating insurance sales from Maine to Virginia, and overseeing American General's offices in New Jersey, Connecticut, Boston, Philadelphia, New York

and the Southeast Region. (Ja 217).[1] Mr. Monaco also recruited, hired, trained and supervised new branch managers and other employees who served under him, and acted as a liaison between the home office and the general agent sales force. (Ja 119; Ja 121). Mr. Monaco's responsibilities were in stark contrast to the branch managers beneath him who were solely responsible for their individual sales offices. (Ja 128).

In May 1999, American General had two Regional Vice Presidents of Sales: Mr. Monaco, the Vice President of Sales for the Eastern Region and Mr. Robert Shaw, the Vice President of Sales for the Western Region. Mr. Monaco testified at his deposition that his and Mr. Shaw's positions were identical in scope and that they were the only two similarly situated employees in the Company. (Ja 125).

In late 1998, American General decided to exit the group medical insurance business due to serious financial losses. Because approximately sixty percent of the sales in Mr. Monaco's Eastern region were group medical sales, sales volume in the Eastern region would decline significantly. In response, American General consolidated its operations and reduced its workforce. As part of the consolidation, American General combined the positions of Eastern and Western Regional Vice Presidents of Sales under Mr. Shaw. At the time, Mr. Shaw, who was born on September 21, 1943, was almost 56 years old and nearly three years older than Mr. Monaco. American General decided to retain Mr. Shaw instead of Mr. Monaco because the company wanted to maintain a senior management sales presence in the West

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1. References to the Reproduced Record filed with the Third Circuit will be made as follows: "Ja [page number]."

where Mr. Shaw was located. (Ja 99). The Company already had senior level managers located in the East, including American General's President and other high-level officers. On or around June 14, 1999, Mr. William Leary, American General's Senior Vice President of Sales and Marketing, informed Mr. Monaco of his layoff, effective on July 1, 1999. Thereafter, Mr. Shaw assumed the day-to-day responsibilities and management of the Eastern regional offices. (Ja 99).

Mr. Monaco brought his action on June 11, 2001, in the Superior Court of New Jersey, Monmouth County, Law Division, alleging age discrimination under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. §§ 10:5-12a and 12e and for breach of contract. On August 2, 2001, Respondents removed the case to the United States District Court for the District of New Jersey based on diversity. On October 25, 2002, the District Court granted Respondents' Motion for Summary Judgment. Petitioner appealed that Order to the Third Circuit on November 7, 2002. In a published opinion, the Third Circuit affirmed the Court's Order that Mr. Monaco had failed to establish a prima facie case of age discrimination under the LAD. The Third Circuit, consistent with the New Jersey Supreme Court's decision in *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 953 (N.J. 1999), rejected Mr. Monaco's contention that the LAD did not require him to demonstrate that he was replaced by someone sufficiently younger as part of his prima facie case. The Third Circuit further relied on its decision in *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 250 (3d Cir. 2002) to reject Mr. Monaco's attempt, in the alternative, to compare himself against several lower-level branch managers who were younger than Mr. Monaco because these branch managers were not "similarly situated."

REASONS FOR DENYING THE PETITION

I. THIS CASE RESTS SOLELY ON WELL-SETTLED NEW JERSEY LAW THAT HAS BEEN DECIDED BY THE NEW JERSEY SUPREME COURT.

A. The Third Circuit Correctly Applied The Law Of The State's Highest Court.

Petitioner asks this Court to reverse the Third Circuit's interpretation and application of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. § 10:5-12a. This Court traditionally denies petitions for certiorari solely to review applications of state law. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *United States v. S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 816 (1984); *Butner v. United States*, 440 U.S. 48, 58 (1979). This Court considers the circuit courts the expert tribunals as to the laws of the state within their circuits and, therefore, their interpretation and application of state law are accorded great deference. *S.A. Empresa*, 467 U.S. at 676. *See also Butner*, 440 U.S. at 57-58 ("federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues"). Furthermore, the decision of a federal court on a question of state law is not binding on state courts, and a decision on a state law issue by a court of appeals does not provide "the national significance that is the typical predicate for the exercise of [the Court's] jurisdiction." *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (Stevens, J., dissenting). There is no reason for the Court to depart from this sound practice in this case.

Petitioner seeks certiorari on the grounds that the Third Circuit "nullified" New Jersey law when it held Petitioner failed to state a claim under the LAD.[2] However, in this case, the Third Circuit did not contravene a state statute or overrule a decision by the state's highest court, but merely disagreed with a flawed interpretation of the state discrimination statute that was clearly at odds with the rulings of the state's highest court. Even a superficial reading of the Third Circuit's opinion reveals that the Court followed the New Jersey Supreme Court's decision in *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 953 (N.J. 1999), and prior state decisional law in holding that Mr. Monaco failed to satisfy the fourth prong of his prima facie case because he could not demonstrate that he was replaced by a younger employee. *Monaco v. American General Assurance Co.*, 359 F.3d 296, 302 (3d Cir. 2004). Mr. Monaco had to concede that he was replaced by someone nearly three years older.

In *Sisler*, the New Jersey Supreme Court addressed whether a 25-year-old worker could assert a reverse age discrimination claim under the LAD.[3] To accommodate

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2. Petitioner erroneously cites *Leavitt v. Jane*, 518 U.S. 137 (1996) to claim that the Third Circuit disregarded New Jersey LAD law. Such a comparison is disingenuous. The *Jane* Court granted certiorari on an issue of state law only because the circuit court blatantly disregarded language in a state statute that specifically instructed courts on how to treat the statute. Here, the Third Circuit followed the prevailing state law on the LAD as set forth in *Sisler* and subsequent federal and state court decisions interpreting the LAD.

3. The LAD provides:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . for an

(Cont'd)

reverse age discrimination claims, the *Sisler* Court modified the first prong of the prima facie case under the *McDonnell Douglas* burden-shifting analysis originally developed by the federal courts in Title VII discrimination cases which requires that an employee demonstrate that he belongs to a protected class. *Sisler*, 723 A.2d at 955; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *Sisler* Court outlined the prima facie case in traditional age discrimination claims as follows: a plaintiff must demonstrate that he: (1) was a member of a protected class; (2) was qualified for the position at issue; (3) suffered an adverse employment action; and (4) was replaced by someone sufficiently younger to raise an inference of age discrimination.[4] *Sisler*, 723 A.2d at 956. The *Sisler* Court modified the first element of a prima facie case in reverse age discrimination cases to require a heightened standard whereby the employee must show "background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority." *Id.* at 959.

While *Sisler* focused on the first prong of the prima facie case, it expressly reaffirmed the fourth element of the prima

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(Cont'd)

> employer, because of the . . . age . . . of any individuals . . . to refuse to hire or employ or . . . discharge . . . from employment.

N.J.S.A. § 10:5-12a.

4. Recognizing that the fourth element is inappropriate in a reduction in force, the Third Circuit has held that the fourth element is satisfied by showing that the employer retained sufficiently younger, similarly situated employees. *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 250 (3d Cir. 2002).

facie case, which requires proof of a replacement who is "sufficiently younger" (or older as the case may be) to permit an inference of age discrimination:

> Under the LAD, which specifies no qualifying age, courts have modified the fourth element to require a showing that the plaintiff was replaced with a 'candidate sufficiently younger to permit an inference of age discrimination.'

Id. at 956 (*quoting Kelly v. Bally's Grand, Inc.*, 667 A.2d 355, 359 (N.J. Super. Ct. App. Div. 1995)).

The Third Circuit was not at liberty to ignore *Sisler*'s language that recognized the necessity of a sufficient age differential between the terminated employee and his replacement. *Monaco*, 359 F.3d at 302. The Third Circuit noted: "It is clear from *Sisler* that when the Supreme Court of New Jersey set out the fourth element of the *McDonnell Douglas* prima facie case framework in an age discrimination case it regarded that standard as applicable in both traditional and reverse age discrimination cases."[5] *Id.* at 303. Accordingly, the Court correctly held that Petitioner failed to state a claim of age discrimination because Mr. Shaw, the

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5. The Third Circuit's conclusion is well-rooted in state and federal law. On the whole, courts have not deviated from the federal standard that requires a plaintiff to demonstrate that he or she was replaced by a sufficiently younger person to create an inference of age discrimination and, in this regard, have interpreted the LAD consistently with the ADEA. *See, e.g., Lawrence v. National Westminister Bank*, 98 F.3d 61, 65-66 (3d Cir. 1996); *See also Constantino v. Borough of Berlin*, 791 A.2d 1118, 1123, n.6 (N.J. Super Ct. App. Div. 2002) ("the analysis of an ADEA claim and a LAD claim have been found to be identical").

Western Regional Vice President who assumed Mr. Monaco's duties following his termination, was three years older.[6]

B. The Third Circuit Properly Rejected Two Intermediate State Court Decisions That Misinterpreted *Sisler*.

The Third Circuit refused to follow two New Jersey appellate court decisions, *Petrusky v. Maxfli Dunlop Sports Corp.*, 775 A.2d 723 (N.J. Super. Ct. App. Div. 2001) and *Reynolds v. Palnut Co.*, 748 A.2d 1216 (N.J. Super. Ct. App. Div. 2000), which incorrectly interpreted *Sisler*.

A federal court is not required to follow the decisions of intermediate state court decisions where it is convinced that the highest court of the state would decide otherwise. *Commissioner v. Estate of Herman J. Bosch*, 387 U.S. 456, 465 (1967). In *Petrusky* and *Reynolds*, the New Jersey Appellate Division inexplicably read *Sisler* to suggest that the fourth prong requiring proof of an age differential sufficient to infer discrimination was added because of the heightened burden imposed by reverse discrimination cases and should not exist in traditional discrimination cases. *Sisler* said nothing of the kind; it only modified the first prong of the prima facie case regarding being a member of the protected class. Subsequent courts have flatly rejected

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6. Only novel and unsettled questions of state law are appropriate for state certification. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Petitioner's citation to *Salve Regina College v. Russell*, 499 U.S. 225, 237 (1991) to support his certification argument is misplaced. The Court in *Russell* considered the proper standard of review for courts of appeals to adhere to when reviewing state law determinations of district courts.

Petrusky and *Reynolds*. In *Swider v. Ha-Lo Indus.*, the District Court confronted the very same issue and held:

> This Court does not agree with the *Reynolds* court's interpretation of *Sisler*. A careful reading of the New Jersey Supreme Court's opinion in *Sisler* suggests the error of the *Reynolds* court's ways. While the *Reynolds* court is correct that the New Jersey Supreme Court has created a heightened standard of proof for establishing a prima facie case in reverse discrimination cases, the heightened showing is as to the first part of the four-part prima facie case, not the fourth. The fourth prong remains unchanged in age discrimination cases, whether they are traditional or reverse.

134 F. Supp. 2d 607, 624 (D. N.J. 2001).

Not only are these decisions based on a misinterpretation of *Sisler*, as the Third Circuit pointed out, *Petrusky* and *Reynolds* would lead to an absurd result where practically every terminated employee would be able to establish a prima facie case of age discrimination without consideration of age. *Monaco*, 359 F.3d at 303.

As an alternative grounds for arguing that the LAD does not require Petitioner to demonstrate that someone sufficiently younger replaced him, Petitioner relies for the first time upon State Model Jury Charge 2.21.[7] Model jury

7. Petitioner did not raise this issue before the Third Circuit or the District Court. Respondents contend that he has waived this argument. *United States v. Abel Cosmo Galletti*, 124 S. Ct. 1548, 1552, n.2 (2004).

charges do not have the force and effect of controlling state or federal common law. *Del Sanotro v. Cendant Corp.*, 223 F. Supp. 2d 563, 579 n.3 (D.N.J. 2002). Furthermore, the model jury charge cited by Petitioner which is a generalized statement of law intended as guidance for New Jersey courts, does not precisely reflect the numerous state and federal decisions interpreting the LAD which have consistently followed the federal standard used in ADEA cases requiring a plaintiff to demonstrate that he or she was replaced by a sufficiently younger person to create an inference of age discrimination. *See e.g. Constantino*, 791 A.2d at 1123, n.6; *Greenberg v. Camden County Vocational and Technical Schools*, 708 A.2d 460, 466 (N.J. Super. Ct. App. Div. 1998); *Baker v. National State Bank*, 711 A.2d 917, 928 (N.J. Super. Ct. App. Div. 1998); *Geldreich v. American Cyanamid Co.*, 691 A.2d 423, 490 (N.J. Super. Ct. App. Div. 1997); *Kelly*, 667 A.2d at 359.

II. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE SCOPE OF THE "SIMILARLY SITUATED" REQUIREMENT AND THERE IS NO COMPELLING REASON FOR THE COURT TO ADDRESS IT.

On the assumption that his initial argument will be rejected and he must show as part of his prima facie case that sufficiently younger, similarly situated workers were retained in a reduction-in-force, Petitioner alleges that younger, similarly situated employees were in fact retained. The District Court and the Third Circuit rejected this argument because these lower-level branch managers to which Mr. Monaco attempted to compare himself were not "similarly situated" based on the factual record.

Petitioner asserts that there is a conflict between the Third Circuit's decision and the Sixth Circuit's decision in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998). However, the case cited by Petitioner involves nothing more than the application of the same basic legal standard to a different, specific factual context. There is simply no conflict between the circuits.

In *Ercegovich*, the Sixth Circuit held that the older laid off worker could establish a prima facie case because several younger workers in the same department were given "selective offers of transfer" while he was not. The *Ercegovich* Court held that the relevant factors in determining who was similarly situated were different than prior Sixth Circuit decisions dealing solely with a job termination because the focus involved the failure to offer an older worker a transfer while younger workers were transferred.[8] Unfortunately for Mr. Monaco, there is no evidence in the record that the employer engaged in either a selective or routine practice of transferring employees into different positions during a reduction in force.[9]

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8. Nor did *Ercegovich* hold that older workers were entitled under the statute to "bump" younger workers; only that the practice, if utilized, could not be applied selectively. Consistent with this ruling, the Third Circuit in *Anderson* also held that while the ADEA does not entitle older workers to displace younger workers, the right of an older worker to claim he should be transferred could be considered where the employer engaged in a "routine" practice of "shuffling" employees. *Anderson*, 297 F.3d at 250. The concepts underlying the language of both *Ercegovich* and *Anderson* are entirely consistent.

9. Mr. Monaco relies on one intermediate state court decision in New Jersey in support of his "bumping" argument. *Granziel v. City of Plainfield*, 652 A.2d 227 (N.J. Super. Ct. App. Div. 1995), (Cont'd)

Despite the unique factual circumstances in *Ercegovich* which led to a discussion of selective transfers, the definition of similarly situated applied by the Sixth Circuit and Third Circuit is essentially the same. *Ercegovich* defines similarly-situated as one whose position is similar to another "in all relevant aspects." *Id.* at 352. The Third Circuit draws a similar conclusion that similarly situated does not mean "situated identically," but is "based on a whole constellation of factors facing that individual employee." *Monaco*, 359 F.3d at 305. Both courts recognize the factual nature of the inquiry, i.e. an examination of the relevant circumstances surrounding the position. Any difference between the Third and Sixth Circuits' analysis is inconsequential and based on the unique factual circumstances applicable to these cases.

In actuality, Petitioner asks this Court to grant certiorari based on his belief that the Third Circuit improperly held that he was not similarly situated to the branch managers, and therefore, did not meet the fourth prong of his prima facie case. Petitioner's request should be denied because this Court does not grant certiorari petitions to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925). *See also Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981). *See also*

(Cont'd)
dealt with the appropriate post-trial reinstatement remedy for a victim of discrimination. *Granziel* held that the trial court had the discretion to displace an incumbent employee to restore the victim of discrimination to his previously-held position rather than placing the victim in a lower-level position until a vacancy occurred. *Id.* at 232. *Granziel's* "rightful place" or "make whole" remedy doctrine does not stand for the proposition that higher-level employees should be able to bump lower-level employees as part of a reduction in force.

SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). The Third Circuit properly concluded that Mr. Monaco "has not produced any evidence to show that his position of vice president of the Eastern Region was similarly situated to that of the eight vice presidents/branch managers whom he directly supervised." *Monaco*, 359 F.3d at 306.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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